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No. 81-2213

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WAKE COUNTY HOSPITAL SYSTEM, INC., *et al.*,
Appellants,

v.

NEWS & OBSERVER PUBLISHING COMPANY, *et al.*,
Appellees.

On Appeal From The Court Of Appeals
Of The State Of North Carolina

MOTION TO DISMISS

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MOTION TO DISMISS

QUESTIONS PRESENTED

The question asserted by the Appellants for review by this Court was not timely or properly raised in the North Carolina courts and is not properly before this Court.

On this Motion to Dismiss, the Questions Presented are:

1. Does this Court have jurisdiction of this appeal under 28 U.S. Code §1257(2) when the validity of a statute of any state has not been drawn in question at any stage of the proceedings in the North Carolina courts on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and when there has been no decision in favor of the validity of any such statute on any ground, constitutional or otherwise?

2. Was the "federal question" sought to be reviewed on this appeal timely, explicitly and properly raised in the courts of North Carolina in accordance with the rules of North Carolina practice?

3. Have the Appellants presented a substantial federal question?

4. Does the judgment of the Superior Court of Wake County, North Carolina, unanimously affirmed by the North Carolina Court of Appeals (Discretionary Review denied by the Supreme Court of North Carolina) rest upon adequate and independent State grounds?

5. Have the Appellants properly complied with Rule 15.1, particularly subparagraphs (g) and (h)?

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On Appeal From The Court Of Appeals Of The State Of North Carolina

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MOTION TO DISMISS: OBJECT AND GROUNDS

Pursuant to Rule 16, the Appellees file this Motion to Dismiss, its object being to have the Court dismiss the appeal for the reasons and upon the grounds and facts set forth as follows:

1. The appeal is not within this Court's jurisdiction as prescribed by 28 U.S. Code §1257 (2), because at no stage in the proceedings in the North Carolina courts has there been drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and there has been no decision in favor of the validity of any such statute.

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* Corporate Appellee's only affiliate or subsidiary (except wholly owned subsidiaries) is Benson Newspaper Printing, Inc.

2. The "federal question" sought to be reviewed on this appeal was not timely, explicitly or properly raised in the courts of North Carolina in accordance with the rules of North Carolina practice and procedure. No North Carolina court has expressly or otherwise passed upon any federal question.

3. The appeal does not present any substantial federal question requiring consideration by this Court.

4. The judgment of the Superior Court, affirmed by the North Carolina Court of Appeals (Discretionary Review denied by the Supreme Court of North Carolina), rests upon adequate and independent State grounds—a nonfederal basis, and no constitutional or other federal question is in any way involved.

5. The Appellants have not met the burden imposed upon them by Rule 15 and have not complied with Rule 15.1(g)(h).

6. There is no valid reason, in law or fact, to support this appeal. The appeal is frivolous and is "an attempt to clutch at the jurisdiction of this Court as an afterthought, when all other resources of litigation have been exhausted."

STATEMENT OF THE CASE

Because of certain inaccurate and misleading statements and material omissions and deficiencies in the Statement of the Case by the Appellants, this Statement is considered essential.

The Appellees agree with the Appellants (Jurisdictional Statement—hereinafter, J.S.—p. 3) that "the facts ... have been found by the courts below and are not in controversy." Therefore, for the undisputed facts the Court is referred to the Judgment (J.S., Appendix, 1a-5a) and the opinion of the North Carolina Court of Appeals (6a-9a).

(NOTE: References in this Motion to Dismiss to "R" are to the Record in the North Carolina Court of Appeals, being certified to the U.S. Supreme Court. Statement of Case references, "1a", "2a", etc., are to J.S. Appendix)

The Appellants do not challenge on this appeal the decisions of the North Carolina courts that the System is "an agency of North Carolina government." (J.S., p. 8, footnote 3) Also, the Appellants do not challenge in this Court the decisions of the State courts that records generally of the System are public records within the meaning of General Statutes §132-1. They refer to the expense account records that were ordered disclosed (J.S., p. 4), but they make no contention that those records are not public records accessible to the Appellees. The single question posed for decision here does not include those records (J.S., p. i).

The Appellants incorrectly asserted (J.S., p. 4) that the plaintiffs (Appellees) claimed a right "to inspect and to obtain copies of all records of the Hospital" pertaining to the settlement of the claims of three medical professional associations that had been based on alleged wrongful termination of agreements to provide professional services, "including communications from counsel and ... including advice of counsel concerning these cases and proposals of settlement." The Appellees have never sought to inspect or have copies of "communications from counsel" of the System or "advice of counsel concerning these cases and proposals of setttlement." That is demonstrated by the statement in the Complaint as to the records sought to be examined (Para. 33, R 10-11, Para. 38, R 13).

Furthermore, the Judgment (2a) describes the records sought to be examined and which the Court (later) ordered to be made accessible for examination. Written confidential communications of counsel as defined by G. S. §132-1.1 were expressly excepted. The last paragraph of the Judgment (5a) provides that the Appellants are ordered to permit the plaintiffs (Appellees) to "examine and have copies of the specific records of the defendant Wake County Hospital System, Inc., hereinbefore described in accordance with the provisions of G. S. §132-6, specifically excepting, however, any written confidential communication of counsel for the defendant Wake County Hospital System, Inc., as defined by G.S. §132-1.1, and excepting also any portion of any minutes of the Board of Directors of the defendant Wake County Hospital System, Inc.,

which may contain any written confidential communication of counsel for the defendant Wake County Hospital System, Inc., as defined by G.S. §132-1.1; and it is ordered that any such communication shall not be subject to public inspection until three years from the date such communication was received by the Board of Directors of the defendant Wake County Hospital System, Inc." (R 31)

The Appellants did not make any exception or assignment of error to the Judgment with respect to records of communications of counsel except in Assignment of Error No. 15 (R 37). That assignment of error merely asserted that "the Court failed and refused to decide ... what was and what was not a communication by legal counsel ..." That did not raise any federal question or constitutional issue involving records of written communications of counsel.

In asserting what the Public Records Statute, G.S. §132-1.1, provides with respect to records containing written communications of legal counsel, Appellants (J.S., p 5) inaccurately state: "... The Public Records Act specifically provides for public access to 'written communications ... made within the scope of the attorney-client relationship by any attorney-at-law serving any such governmental body or the governmental entity for which such body acts, or concerning the prosecution, defense, settlement or litigation of any judicial action ...'" That statement of the provisions of G.S. §132-1.1 tends to be misleading, even though the Appellants added the clause: "except that such communications are subject to a three-year hiatus before becoming public records. G.S. §132-1.1" As worded, G.S. §132-1.1 is an affirmative exemption of written communications of counsel to any public board from "public records" as defined by G.S. §132-1.

Furthermore, the only reference in the proceedings to any communication of counsel appears in paragraph 28 of the Answer to the Complaint (R 17) as follows: "... at which time its [the System's] attorney reported on the three (3) complaints above referred to ..." It is not stated there or in any affidavit or other evidence that any "written communication" has ever been made by counsel of the System to the System or its Board.

In Appellants' Statement of the Case (J.S., p. 5), they assert that in opposition to the plaintiffs' (Appellees') Motion for Summary Judgment, the defendants (Appellants) "argued, *inter alia,* that the defendants in the action and the persons dealing with the Hospital had a right of privacy in the confidential communications protected under the Federal Constitution and that the North Carolina statute construed to violate that right would render the statute invalid as repugnant to the United States Constitution. . ." THAT STATEMENT IS ABSOLUTELY INACCURATE. The Appellants DID NOT ARGUE any such contention during the Superior Court proceedings. There is nothing in the record of those proceedings showing that the defendants (Appellants) pleaded in their Answer or asserted in any document filed by them in the Superior Court that any federal constitutional question was involved in any way in this action or that the defendants or any persons dealing with the System had "any right of privacy in the confidential communications protected under the Federal Constitution" or that "the North Carolina statute construed to violate that right would render the statute invalid as repugnant to the United States Constitution." (R 2-32) The Appellants cannot and do not cite any written evidence that a federal constitutional question was raised in the trial court. Argument —without a plea or other written document—is not an acceptable method of raising a federal question. It is repeated that Appellants DID NOT ARGUE in the Superior Court any such constitutional contention.

Even if the question had been "argued" (which is again denied), that would not be sufficient under North Carolina practice to raise a constitutional issue. "Every defense, in law or fact, to a claim for relief in any pleading, . . . shall be asserted in the responsive pleading thereto" or may be made by motion. N.C. Rules of Civil Procedure, Rule 12(b). Affirmative defenses must be specially pleaded. *Id.*, Rule 8(c). That was not done by the Appellants.

The Appellants' Statement of the Case (J.S., p. 6) asserts that the defendants filed a timely appeal to the North Carolina Court of Appeals, "arguing" that the Superior Court judgment "violated 'the reasonable expectations of privacy' of both the

Hospital and the earlier litigants against the Hospital and the North Carolina statute as so construed and applied thus violates the right of privacy under the United States Constitution." It is then asserted that the Court of Appeals "affirmed the judgment of the trial court, rejecting the constitutional arguments. . ." (J. S., p. 6) It should be observed that Appellants use the word *arguing*. They do not state and they could not truthfully state that their Assignments of Error filed in the North Carolina Court of Appeals included any assignment of error that asserts that the Superior Court Judgment "violated the reasonable expectations of privacy" of the System or of the "earlier litigants." Nor is there an assignment of error that any North Carolina Statute as construed and applied by the Superior Court "violates the right of privacy under the United States Constitution." (See Assignments of Error, R 34-38.)

The Court's attention is accordingly invited to the fact that the Appellants' Statement of the Case does not sufficiently meet the requirements of Rule 15.1(g). They do not show that any federal constitutional question was properly raised in either the Superior Court or in the Court of Appeals. They assert only that constitutional questions were "argued" in both courts, without any written evidence in the record to substantiate those contentions. Appellants do not even contend in the Jurisdictional Statement that any *specific* provisions of the U.S. Constitution were mentioned in any of the arguments.

This case involves only questions of State law—statutory construction—not any constitutional or other federal question. The Appellants conceded this in their brief filed in the North Carolina Court of Appeals (page 15) where they asserted that "the right to disclosure of public records is *statutory, and not constitutional;* the standards of this case called for an adjudication of whether the Defendants were persons within the meaning of the 1935 provisions or the 1975 amendments to the Public Records Law, . . . " (Emphasis added)

Referring to G.S. §132-1, the North Carolina Court of Appeals stated the principal questions of law before the Court as follows (55 N.C. App. at p. 7, 284 S.E.2d at p. 546-10a):

> Under this statute, two questions must be answered: First, whether the trial judge was correct in concluding that the System is an "agency of North Carolina government or its subdivisions"; i.e., Wake County; and second, if the System is an agency, whether its records are "public records" that were "made or received pursuant to law or ordinance in connection with the transaction of public business . . . "

The Court of Appeals answered those questions in favor of the Appellees (15a, 16a). Had there been a federal constitutional question, certainly the Court of Appeals would have so stated.

ARGUMENT

I. This Appeal Is Not Within This Court's Jurisdiction Because The Validity Of A State Statute Has Not Been Drawn In Question As Repugnant To United States Constitution, Treaty Or Law In Accordance With State Practice Rules.

The appeal is not within the jurisdiction of this court because it is not taken in conformity with 28 U.S. Code, §1257 (2) which states:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Nowhere in any of the proceedings in the North Carolina courts was the validity of any state statute drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States or on any other ground. There has

been no pleading, motion or other written document constituting a part of the record of proceedings in the North Carolina courts that any North Carolina statute involved in this litigation is invalid on federal constitutional grounds or any other grounds (R 2-27).

The Supreme Court will not decide federal constitutional issues raised before it for the first time on review of state court decisions. *Cardinale v. Louisiana,* 394 U.S. 437, 438, 89 S.Ct. 1161, 1162, 22 L.Ed.2d 398 (1969); *Webb v. Webb,* 451 U.S. 493, 498, 101 S.Ct. 1889, 1893, 68 L.Ed.2d 392 (1981), and cases cited.

In the Jurisdictional Statement, ONLY ONE federal constitutional question is sought to be reviewed in this Appeal. That question involves a CONTENTION that the North Carolina Public Records Law and Open Meetings Law (G.S. §132-1, §143-318.10 and §143-318.11) are invalid because they violate "a privacy right protected by the Constitution of the United States" by forcing public disclosure of records of the Appellant Wake County Hospital System, Inc. ("System")—"specifically documents generated and discussions occurring in the course of litigation, covered at least in part by the attorney-client privilege, when ... there was a reasonable expectation that these documents would remain private." (J.S. p. i)

The Appellants in the Jurisdictional Statement point to no pleading, motion or other document filed by them in which the constitutional validity of any North Carolina statute was challenged. The Appellants did not include in their Assignments of Error filed in the North Carolina Court of Appeals any assertion of error based on the validity of any North Carolina statute on any federal constitutional ground (R 34-38).

Instead, Appellants in the Jurisdictional Statement contend only that this constitutional question was "argued" in the Superior Court and in the North Carolina Court of Appeals. They do not support their assertions by any citation to any part of the record of the proceedings.

The Supreme Court has held that "the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right." *F. G. Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655, 17 S.Ct. 709, 711, 41 L.Ed. 1149 (1897).

In *Webb v. Webb*, 451 U.S. 493, 501, 101 S.Ct. 1889, 1894, 68 L.Ed.2d 392 (1981), Mr. Justice White makes it clear that

> ... At a minimum, however, there should be no doubt *from the record* that a claim under a *federal* statute or the *Federal* Consitution was presented in the State courts and that those courts were apprised of the nature and substance of the federal claim at the time and in the manner required by the state law.... (Emphasis added)

It is thus well established that the Supreme Court looks to the record of the proceedings in the State court to determine whether a federal question has been timely and properly presented for decision by the State Court. Contentions by Appellants that constitutional questions were "argued" in the State courts, unsupported by the record, are not sufficient.

The only basis of a contention that the "privacy rights" of the Medical Professional Associations were violated by the Superior Court Judgment is the agreement made by the Appellant System with the Proessional Associations that "the terms of the settlement of each claim would be kept confidential and would not be publicly revealed." It should be noted that the plaintiffs (Appellees) alleged that agreement and then alleged that the agreement "was and is in violation of G.S. §143-318.*13*(a)(4) [later codified: G.S. §143-318.*11*(a)(4)] and Chapter 132 of the General Statutes, and, therefore, is null and void and of no legal effect." The defendants (Appellants) admitted the agreement but denied the legal conclusions (Complaint, para. 30, 31, R 9-10; Answer, para. 30, 31, R 17). THERE IS NO FURTHER REFERENCE TO THAT AGREEMENT IN ANY PLEADING OR ANY OTHER DOCUMENT FILED IN THE SUPERIOR COURT (R 2-27).

There is no reference to that agreement in the Assignments of Error (R 34-38).

If the Appellants desired to raise a federal constitutional question with respect to the validity of the agreement not to disclose to the public the records reflecting the terms of the claim settlements (its invalidity having been specifically alleged by the Appellees), the Appellants were required by North Carolina rules of practice and procedure to raise such question by the pleading of an affirmative defense or by a motion. N.C. Rules of Civil Procedure, Rules 8(c) and 12(b) [Appendix to Motion to Dismiss, p. 5a]

The Appellants list in the Jurisdictional Statement (p. 2) the following United States Constitutional provisions: "Article VI and the First, Third, Fourth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution" and those constitutional provisions are set forth in the Appendix to the Jurisdictional Statement (19a-21a).

It should be observed that NO FURTHER REFERENCE is made in the Jurisdictional Statement to any of those constitutional provisions listed (J.S. p. 2) and set forth (Appendix, 19a—21a) EXCEPT the following reference to the Fourteenth Amendment (J.S., p. 6): "... the right of privacy is within the Fourteenth Amendment's concept of personal liberty..."

More significant and important, none of those listed federal constitutional provisions has been stated or cited in any pleading, motion or other document filed by the Appellants in the Superior Court proceedings. None has been stated or cited in the Assignments of Error (R 34-38) except a reference to the Fourteenth Amendment in Assignment No. 1 objecting to the failure to join necessary parties (R 34) which is not an issue or question before the Supreme Court. None of these constitutional provisions was cited or even referred to in the Appellants' Petition for Discretionary Review filed in the North Carolina Supreme Court. (Motion to Dismiss, p. 7a)

The Supreme Court "has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions." *Webb v. Webb*, 451 U.S. 493, 499, 101 S.Ct. 1889, 1893, 68 L.Ed. 2d 392 (1981), and cases

cited. Furthermore, *Webb* makes it clear the record as a whole must show clearly and explicitly that a *particular* federal constitutional provision was presented in the State courts.

In the Jurisdictional Statement the Appellants have not complied with Rule 15.1(g) and shown that the validity of a state statute was timely, explicity and properly drawn in question in any of the North Carolina courts on the ground of its being repugnant to the Constitution, treaties or laws of the United States. They have not shown that there has been a decision by any of the North Carolina courts in favor of the validity of any state statute on any such ground, simply because no issue as to the validity of any statute was timely or properly raised. Therefore, this Court does not have jurisdiction on this appeal, and the appeal should be dismissed. 28 U.S. Code § 1257 (2); Rule 15; *Charleston Federal Savings and Loan Association v. Alderson*, 324 U.S. 182, 185, 65 S.Ct. 624, 627, 89 L.Ed. 857 (1945); *Chicago, Indianapolis, & Louisville Railway Company v. McGuire*, 196 U.S. 128, 25 S.Ct. 200, 49 L.Ed. 413 (1905); *Mutual Life Insurance Company v. McGrew*, 188 U.S. 291, 23 S.Ct. 375, 47 L.Ed. 480 (1903); *Webb v. Webb, supra.*

II. The Appellants Failed To Raise Any Federal Question In The Trial Court As Required By North Carolina Rules Of Practice As Prerequisite For Consideration Of Any Such Question By North Carolina Appellate Courts.

The only power or jurisdiction of the United States Supreme Court over State court judgments is "to correct them to the extent that they adjudge federal rights." *Herb v. Pitcairn*, 324 U.S. 117, 125-126, 65 S.Ct. 459, 463, 89 L.Ed. 789 (1945).

For the Supreme Court to have jurisdiction to review a decision of the highest court of a State, it must be shown by the party seeking the review that the asserted federal constitutional question was timely, explicitly and properly raised, preserved or passed upon in the State courts. *Webb v. Webb*, 451 U.S. 493, 498-499, 101 S.Ct. 1889, 1893, 68 L.Ed. 2d 392 (1981).

Federal constitutional questions not raised timely and properly in the State courts in accordance with State court practice will not be considered and decided by the United

States Supreme Court. *Wolfe v. North Carolina,* 364 U.S. 177, 195-196, 80 S.Ct. 1482, 1492-1493, 4 L.Ed. 2d 1650 (1960); *Pennsylvania Railroad Company v. Illinois Brick Company,* 297 U.S. 447, 462-463, 56 S.Ct. 556, 561, 80 L.Ed. 796 (1936).

"*The proper time* [for raising a federal question] is in the trial court whenever that is required by the state practice, . . . (Citations omitted; emphasis added) *Mutual Life Insurance Company v. McGrew,* 188 U.S. 291, 308, 23 S.Ct. 375, 378, 47 L.Ed. 480 (1904).

"*The proper way* [to raise a federal question] is by pleading, motion, exception or other action, part, or being made part, of the record, showing that the claim was presented to the court. (Citation omitted) It is not properly made when made for the first time in a petition for rehearing after judgment; or in the petition for writ of error; or in the briefs of counsel not made part of the record. (Citations omitted) The assertion of the right must be made unmistakably, and not left to mere inference." (Citations omitted; emphasis added) *McGrew,* 188 U.S. at p. 308, 23 S.Ct. at p. 378, 47 L.Ed. 480 (1904).

North Carolina Practice Rule

It is a well-established rule of North Carolina practice and procedure that an appellate court of the State "will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below." State ex rel. *Commissioner of Insurance v. North Carolina Rate Bureau,* 300 N.C. 381, 428, 269 S.E.2d 547, 577 (1980) and cases cited; *State v. Cumber,* 280 N.C. 127, 185 S.E.2d 141 (1971).

In *Cumber,* a constitutional question was not raised in the trial court; it was sought to be raised for the first time in the North Carolina Court of Appeals. The Supreme Court of North Carolina in that case dismissed the appeal, holding that the constitutional question was not properly before the Court of

Appeals nor before the North Carolina Supreme Court. Huskins, J., in the opinion of the North Carolina Supreme Court, wrote as follows (280 N.C. at pp. 131-132, 185 S.E.2d at p. 144):

> ... That belated constitutional question was injected for the first time on appeal to the Court of Appeals and therefore came too late. It was not properly before that court and is not now properly before us. "The attempt to smuggle in new questions is not approved. *Irvine v. California,* 347 U.S. 128, 129, [74 S.Ct. 381, 98 L.Ed. 561]. Appellate courts will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court. *State v. Jones,* 242 N.C. 563, 564, 89 S.E.2d 129. This is in accord with the decision of the Supreme Court of the United States. *Edelman v. California,* 344 U.S. 357, 358 [73 S.Ct. 293, 294, 97 L.Ed. 387]."....

The Appellants did not raise any federal question, constitutional or otherwise, in the trial court. The Appellants filed only two documents in the Superior Court: Answer to the Complaint (R 14-19) and Answers to Plaintiffs' Interrogatories (R 24-26). They did not plead in their Answer any constitutional provision (Federal or State) or any federal question.

The only federal question sought to be reviewed in this appeal is whether the North Carolina Public Records Statute (G.S. §132-1) constitutes a violation of a claimed privacy right to prevent public access to records of claim settlements made by agreements between the Appellant Wake County Hospital System, Inc., and three medical professional associations in which it had been agreed that the settlement terms would not be publicly disclosed. The Appellants did not plead any defense to the allegations in the Complaint (R 10) that the agreement not to disclose the settlement terms publicly was null and void because contrary to the requirements of the Public Records Statute. Appellants did not plead any of the federal constitutional provisions listed in the Jurisdictional Statement, nor Article I, Section 10 of the United States Constitution

(prohibition against any State law "impairing the Obligations of Contract"), nor any other provision of the United States Constitution.

In response to the Plaintiffs-Appellees' Motion for Summary Judgment, the Defendants-Appellants did not file any counter affidavit or any other evidence or document. (See Judgment, first paragraph (R 27-28), statement of documents before court.)

The feeble assertion by Appellants in the Jurisdictional Statement that the constitutional question was "argued" in the Superior Court—unsupported by any documentary evidence in the record—is not sufficient to raise a federal constitutional question.

A reading of the Judgment of the Superior Court (R 27-31) will reveal conclusively that no federal constitutional question was considered or passed upon by the Superior Court. When there is a failure of a court to pass upon a federal question, there is a presumption that the omission was due to a want of proper presentation. See *Webb v. Webb*, 451 U.S. 493, 495-496, 101 S.Ct. 1889, 1891, 68 L.Ed.2d 392 (1981) and cases cited. The Appellants have not met their burden of rebutting the presumption.

III. In Their Assignments or Error Filed In The North Carolina Court of Appeals, The Appellants Failed to Assert The Federal Constitutional Question Sought To Be Reviewed On This Appeal Or Any Other Explicitly and Properly Raised Federal Question.

When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts," unless the aggrieved party in the United States Supreme Court "can affirmatively show the contrary." *Webo v. Webb*, 451 U.S. 493, 495-496, 101 S.Ct. 1889, 1891, 68 L.Ed.2d 392 (1981); *Fuller v. Oregon*, 417 U.S. 40, 50, footnote 11, 94 S.Ct. 2116, 2123, 40 L.Ed.2d 642 (1974); *Bailey v. Anderson*, 326 U.S. 203, 206-207, 66 S.Ct. 66, 68, 90 L.Ed. 3 (1945).

Nowhere in the opinion of the North Carolina Court of Appeals "is any federal question mentioned, let alone expressly passed upon." *Webb*, 451 U.S. at 495, 101 S.Ct. at 1891, 68 L.Ed.2d 392 (1981).

The ONLY claimed question on this appeal is whether the North Carolina Public Records Law and Open Meetings Law constitute a violation of a right of privacy protected under the U.S. Constitution by requiring public access to the records of the Appellant Hospital System containing the terms of settlement of the claims of three medical professional associations (J.S., p. i).

The North Carolina Court of Appeals could not and did not consider or pass upon any such question because none was raised or passed upon in the Superior Court, as shown in Section II hereof.

The scope of review on appeal to the Court of Appeals, under North Carolina Rules of Appellate Procedure, "is confined to a consideration of those exceptions set out and made the basis of assignments of error in the record on appeal." Rule 10(a). "Any exception which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be set out in the record on appeal and made the basis of an assignment of error. Bills of exception are not required..." Rule 10(b). "The exceptions upon which a party intends to rely shall be indicated by setting out at the conclusion of the record on appeal assignments of error based upon such exceptions..." Rule 10(c). [Motion to Dismiss, 3a-5a]

In the Jurisdictional Statement the Appellants DO NOT CITE OR OTHERWISE ALLUDE TO any Assignment of Error filed by them in the Court of Appeals. Thus, they have not even sought to show that there was an assignment of error that presented to the North Carolina Court of Appeals the claimed federal constitutional question sought to be reviewed by the Supreme Court. They merely make the following

statement in a futile effort to suggest that the claimed constitutional question was raised in the Court of Appeals (J.S., p. 6):

> The Hospital and the other defendants filed a timely appeal to the North Carolina Court of Appeals, ARGUING, *inter alia,* that the order of the trial court violated "the reasonable expectations of privacy" of both the Hospital and the earlier litigants against the Hospital (Appellants' Brief to the N.C. Ct. of App., pp. 36-37) and the North Carolina statute as so construed and applied thus violates the right of privacy under the United States Constitution (e.g. *id.* at 33) . . . (Emphasis added.)

An *argument* in a brief is no substitute for asserting grounds for review in Assignments of Error. Thus, the North Carolina Supreme Court has held that a contention in a brief that is not based on any exception and assignment of error will not be considered on appeal. *Lewis v. Parker,* 268 N.C. 436, 437, 150 S.E.2d 729, 730 (1966); *Glace v. Pilot Throwing Co.,* 239 N.C. 668, 671, 80 S.E.2d 759, 761 (1954), where the Court said: "Defendants in their brief contend . . . The defendants have precluded us from considering this contention by failing to present it by exception and assignment of error. . ."

THE OBVIOUS REASON THAT THE APPELLANTS MAKE NO REFERENCE IN THE JURISDICTIONAL STATEMENT TO THE ASSIGNMENTS OF ERROR FILED IN THE COURT OF APPEALS IS THAT THERE IS NO ASSIGNMENT OF ERROR THAT RAISED THE QUESTION SOUGHT TO BE REVIEWED BY THE SUPREME COURT (See Assignments, R 34-38.)

The Appellants filed 16 assignments of error in the North Carolina Court of Appeals. Although "exceptions" are referred to in the Assignments of Error, it will be observed that there are NO EXCEPTIONS in the record prior to and except as they are included in the Assignments of Error.

Except in Assignment of Error No. 1 (R 34), there is no reference in any of the Assignments of Error to a *specific provision* of the United States Constitution. That assignment asserted that the Superior Court Judgment was void for failure

to join necessary parties "contrary to . . . the Fourteenth Amendment of the United States Constitution guaranteeing to each person whose rights are adjudicated due process of law, . . ." That question has not been raised in this appeal. In any event, there had been no objection to the absence of necessary parties during the trial court proceedings, and, therefore, the question was not timely and properly raised on appeal. *State v. Cumber,* 280 N.C. 127, 131-132, 185 S.E.2d 141, 144 (1971).

In 10 of the 16 Assignments of Error, there is no reference either specifically or generally to the Federal Constitution (Assignments numbered 2, 3, 6, 8, 9, 10, 12, 14, 15, and 16).

In four of the Assignments of Error there are general, vague and non-explicit references as follows: (a) No. 4 (R 34): "in potential conflict with Constitutional rights"; (b) No. 5 (R 35): "in potential conflict with Constitutional right of patients, employees, business associates, and all persons entitled to privacy concerning private records"; (c) No. 11 (R 36): "unconstitutional on the grounds . . . "; (d) No. 13 (R 37): "unconstitutionally."

In Assignment of Error No. 7 (R 35), there is no reference to any constitutional provision, but it is asserted in that assignment that the Court was without jurisdiction to adjudicate privacy rights of non parties because of lack of "procedural due process of law and joinder of necessary parties in interest."

Thus, aside from a failure to raise any federal question TIMELY in the Superior Court as required by the rules of practice, *State v. Cumber,* 280 N.C. 127, 131-132, 185 S.E.2d 141, 144, the Appellants in the five Assignments of Error summarized above failed to raise a federal question WITH THE SPECIFICITY REQUIRED BY THE UNITED STATES SUPREME COURT. *Webb v. Webb,* 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981); *Herndon v. Georgia,* 295 U.S. 441, 443, 55 S.Ct. 794-795, 79 L.Ed. 1530 (1935).

It follows that since the question sought to be reviewed here was not raised in the Assignments of Error filed in the Court of Appeals and was not mentioned or expressly passed upon in the opinion of the Court of Appeals, that question will not be reviewed by the United States Supreme Court.

IV. Even If Appellants Had Timely And Properly Raised Any Federal Constitutional Question For Decision By The North Carolina Court Of Appeals (Denied By Appellees), Appellants Did Not Preserve Or Present Any Federal Constitutional Question In Their Petition To The North Carolina Supreme Court For Discretionary Review Of The Court Of Appeals Decision.

The Jurisdictional Statement fails to mention any contention or assertion of error made by the Appellants in their Petition for Discretionary Review filed in the North Carolina Supreme Court. It is significant that in that Petition there is no claim that there was any federal constitutional question for decision or that the North Carolina Court of Appeals had passed upon any federal question requiring review by the North Carolina Supreme Court. In fact, the words "constitution," "constitutional," "constitutionality" or "federal question" do not appear therein. [Petition for Discretionary Review reproduced verbatim in Appendix to this Motion to Dismiss, p. 7a]

In the Petition for Discretionary Review, the Appellants made the following assertions as to questions for review and errors committed by the Court of Appeals:

(a) "One of the major purposes of this litigation was to obtain a determination" of the question of whether Wake County Hospital System, Inc., "is an agency of North Carolina Government as defined in the Public Records Act." N.C.G.S. §132-1 (Petition, para. 3) A determination of that question "poses serious legal difficulties." (Petition, para. 4)

(b) "The Court of Appeals failed to properly consider the existence of numerous statutes" of North Carolina—summarized. (Petition, para. 5)

(c) ". . . The North Carolina Court of Appeals failed to properly consider the analogy of" *Martin v. Commissioners of Wake County*, 208 N.C. 54, 156 S.E. 137 (1935) "to the existence of the Wake County Hospital System, Inc. . ." in deciding the pending case. (Petition, para. 6)

(d) "The Court of Appeals erred in its interpretation of two relatively recent cases: *Coats v. Sampson County Memorial Hospital,* 264 N.C. 332, 141 S.E.2d 490 (1965) and *Sides v. Cabarrus County Hospital,* 287 N.C. 14, 213 S.E.2d 297 (1975)." *** "Consideration by the Court of Appeals of the *Sides* case is inappropriate." (Petition, para. 7)

(e) "The Federal Administrative Procedure Act as cited by the Court of Appeals is inappropriate to the circumstances. . ." (Petition, para. 9)

(f) "The Supreme Court should consider the possibility that the language of the Court of Appeals will require the determination that numerous hospitals within the State of North Carolina are public agencies. . ." (Petition, para. 10)

(g) The Court of Appeals "failed to recognize the following Genuine Issues of Material Fact raised by the pleading." [Six alleged issues of facts are then stated.) (Petition, para. 11)

The Appellants in their Petition for Discretionary Review DID NOT make any reference to the question sought to be reviewed by the United States Supreme Court.

"If the [federal] question was presented to lower state courts, but was not properly preserved on appeal to higher state courts, the requirement that the issue be presented to the highest state court has not been satisfied." Wright and Miller, *Federal Practice and Procedure,* Vol. 16, §4022, p. 697 (1977).

In *Cardinale v. Louisiana,* 394 U.S. 437, 438, 89 S.Ct. 1161, 1162, 22 L.Ed.2d 398 (1969), the Supreme Court dismissed a writ of certiorari because a federal question "had never been raised, *preserved,* or passed upon in the state courts below." (Emphasis supplied) See also *Webb v. Webb,* 451 U.S. 493, 498-499, 101 S.Ct. 1889, 1893, 68 L.Ed.2d 392 (1981).

In *F.G. Oxley Stave Co. v. Butler County,* 166 U.S. 648, 653, 17 S.Ct. 709, 710, 41 L.Ed. 1149 (1897), it was pointed out: "... Nor can it be inferred from the opinion of the

supreme court of Missouri that that court was informed by the contention of the parties that any federal right, privilege, or immunity was intended to be asserted. For aught that appears, the state court proceeded in its determination of the cause without any thought that it was expected to decide a federal question."

The North Carolina Supreme Court, without opinion, denied the Appellants' Petition for Discretionary Review of the decision of the Court of Appeals. It is obvious from an examination of that Petition that *the North Carolina Supreme Court was not informed by any contention therein that any federal question was involved.* It is equally obvious that the North Carolina Supreme Court proceeded to act upon (and to deny) the Petition for Discretionary Review "without any thought that it was expected to decide a federal question." Thus, this appeal should be dismissed upon this ground alone.

V. Even If Appellants Had Properly Raised In The State Courts A Federal Constitutional Question As To Privacy Rights, Neither The Hospital System Nor The Three Medical Professional Associations Have Any Federally Recognized Rights Of Privacy.

The Appellants contend that this case "presents a claimed Federal Constitutional right of privacy" (J.S., p. 7), "important enough" to be decided by this Court (J.S., p. 10). They assert that the claimed privacy rights are those of "the three non-Hospital parties to the suits the confidential papers of which were ordered disclosed in this action" and also "the privacy rights of the Hospital and its officers and directors." (J.S., pp. 8-9, footnote 4)

The so-called privacy rights of the Hospital System and its officers and directors are claimed for the first time in the Jurisdictional Statement—and then in a footnote. The privacy rights of the medical professional associations now sought to be claimed have never been pleaded or otherwise presented for decision in any of the State courts. Thus, the statement (J.S., p. 7) that "the claimed federal right was rejected" is inaccurate because it was never raised in the State courts.

The Appellant System and the medical professional associations are corporations. Therefore they have no rights of privacy. *United States v. Morton Salt Company,* 338 U.S. 632, 651-652, 70 S.Ct. 357, 368-369, 94 L.Ed. 401 (1950); *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 778, footnote 14, 98 S.Ct. 1407, 1416-1417, 55 L.Ed.2d 707 (1978), rehearing den., 438 U.S. 907 (1978); Restatement of Torts (2d) §652 I, p. 403 (1977); ANNOTATION, 30 ALR 3d 203, 211.

The Appellants in their Jurisdictional Statement have not cited any court decision or other authority holding that an agency of government and its officers have any rights of privacy. Certainly the Appellants have no right to disobey the mandate of a Public Records Statute requiring public inspection of public records in their custody. G.S. §132-1; §132-6.

The Appellants have not cited any court decision holding that a corporation has any right of privacy under the United States Constitution.

The decisions of the Supreme Court cited by the Appellants involving questions of privacy rights all related to personal rights of individuals and were rendered in contexts different from the facts of this case. (J.S., 6-7) *Griswold v. Connecticut,* 381 U.S. 479 (1965) involved the right of marital privacy. *Stanley v. Georgia,* 394 U.S. 557 (1969) involved the right of an individual to possess obscene films in the privacy of his home. *Nixon v. Administration of General Services,* 433 U.S. 425 (1977) involved a former U.S. President's claimed privacy interests, held not to be infringed by the Presidential Recordings and Materials Preservation Act. In *Whalen v. Roe,* 429 U.S. 589 (1977) it was held that a State statutory requirement that disclosures of private medical information, which are often made to doctors, hospital personnel, insurance companies and to public health agencies, be made "to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy." In *Katz v. United States,* 389 U.S. 347 (1967), it was held that an individual's Fourth Amendment rights against unlawful searches and seizures were violated when his telephone conversations while in a public telephone booth were

overheard and recorded by F.B.I. agents by means of an electronic device. None of those decisions is pertinent to the pending case.

Appellants cite two state court cases [*City of Carmel-by-the-Sea v. Young*, 2 Cal. 3d 259, 85 Cal. Reptr. 1, 466 P.2d 225 (1970) and *Byron, Harless, Schaffer, Reid & Assoc., Inc. v. State of Florida*, 360 So.2d 83 (Fla. App. 1978)] and assert that "in each the Federal Constitutional right to privacy was held to supercede the state statute that would have forced disclosure." (J.S., p. 7)

The *Young* case involved the constitutional validity of a state statute that required every public officer and candidate for public office and certain executive employees of governmental agencies to file a statement, to be a public record, describing the nature and extent of investments in excess of $10,000 of the officer, employee or candidate and his or her spouse and every minor child thereof. The Court held the statute unconstitutional because it "undertakes an overbroad intrusion into the right of privacy and thereby invalidly restricts the right to seek or hold public office or employment." (466 P.2d at 227) The statute applied only to individuals, their spouses and minor children. It did not apply to corporations. The *Young* case, decided 12 years ago in an entirely different context, has no relevance or significance to the matter before this Court.

Cited Florida Case REVERSED

As a reason that the Supreme Court should decide the pending case, the Appellants (J.S., p. 7) assert that in *Byron, Harless, Schaffer, Reid & Associates, Inc. v. State of Florida* [*ex rel. Schellenberg and Shevin*], 360 So.2d 83 (Fla. App. 1978), "the Federal Constitutional right to privacy was held to supercede the state statute that would have forced disclosure." APPELLANTS FAILED TO INFORM THIS COURT THAT THE SUPREME COURT OF FLORIDA *REVERSED* THE DECISION OF THE FLORIDA COURT OF APPEALS. *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.*, 379 So.2d 633 (Fla. 1980).

The decision of the Florida Supreme Court supports the Judgment and decision of the North Carolina Courts in the pending case.

In *Shevin*, the Florida Supreme Court held there is no federal constitutional right of privacy to preclude public disclosure of papers prepared by a consulting corporation for a municipal electric authority in connection with the consultant's confidential search for potential applicants for the position of managing director of the electric authority. The consultant contacted numerous individuals and "those individuals interviewed were uniformly assured that the interview was confidential." The court held that the consulting corporation was an "agency" to which the Florida Public Records Law applied and that the papers (*including* resumes and letters from potential applicants for the position, memoranda and other records containing information about prospective applicants, but *excluding* rough drafts) were "public records" subject to public inspection under the Florida Public Records Statute.

The Florida Supreme Court (379 So.2d 636-638) discussed four of the five U.S. Supreme Court decisions cited by the Appellants in their Jurisdictional Statement (*Griswold, Nixon, Katz* and *Whalen*), J.S. pp. 6-7, and concluded there does not exist "a constitutionally protected interest sufficient to prevent the public from seeing the consultant's papers." (379 So.2d at 638) The Court cited (same page) *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) as controlling.

The Appellees here submit that the principles enunciated by the Supreme Court in *Paul* are applicable to the pending case, even stronger so because *Paul* involved constitutional rights of privacy claimed by an individual. Here the rights are claimed for corporations and a government agency.

The Appellants' contention that they have standing to claim privacy rights on behalf of non-parties (J.S., pp. 8-9) is not persuasive. See *Tileston v. Ullman*, 318 U.S. 44, 63 S.Ct. 493, 87 L.Ed. 603 (1943); *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). This is particularly so in view of the fact alluded to by the Appellants (J.S., p. 5, footnote 2) that the three medical professional associations

made formal written statements filed with the North Carolina Court of Appeals indicating no desire to become parties to this action and waiving that right. (See Appendix to this Motion to Dismiss, p. 6a for verbatim reproduction of the statement.)

In an effort to support a contention that "the facts in this case show the existence of a 'legitimate expectation of privacy' " (J.S., p. 7) and a later contention that "when most of the documents ordered disclosed in this case were generated, there was a reasonable basis for an expectation by all involved that they were private documents that would remain private" (J.S., p. 9), the Appellants not only make statements that confuse the two North Carolina statutes involved (the Open Meetings Statute and the Public Records Statute) [J.S., pp. 8-9], but they FAIL TO BRING TO THE ATTENTION OF THIS COURT A NORTH CAROLINA STATUTE THAT WAS ENACTED IN *1978* AND BECAME EFFECTIVE ON OCTOBER 1, *1978*. That fact, not disclosed by the Appellants, destroys the basis of their arguments on this point by CONTRADICTING AND RENDERING FALSE APPELLANTS' STATEMENT (J.S., p. 7): "It was not until October 1, *1979*, that North Carolina G.S. 143-318 was amended to apply to hospitals such as the Hospital in this action." (Emphasis added) [See Appendix to this Motion to Dismiss, p. 2a, where the 1978 and the 1979 statutes are reproduced.]

It follows, therefore, that arguments in the Jurisdictional Statement (pp. 7-10), attempting to show the existence of a "legitimate expectation of privacy," are made upon a false premise since the Hospital System became a public body on October 1, *1978*, instead of October 1, *1979*. The three lawsuits that were settled in August and December *1979* were commenced on 19 December *1978*, almost three months after the Hospital System became a public body under G.S. §143-318.2(b). Furthermore, the Public Records Statute, G.S. §132-1, was enacted in 1935 and was last amended in 1975. (See J.S. Appendix, 22a.) It is under the Public Records Statute that the North Carolina courts held that the Hospital System was an agency of North Carolina government and that its records are "public records." Certainly, medical professional associations dealing with "an agency of government" and "a public body"

could not reasonably claim a "legitimate expectation of privacy" in their dealings with the agency of government. They knew or should have known that any agreement that the settlement terms would not be publicly disclosed was in violation of the Public Records Statute. An agency of government has no power to contract that it will not comply with a State statute that requires it to permit public access to its records. *Doe v. Salmon,* 135 Vt. 443, 378 A.2d 512 (1977); *Robles v. Environmental Protection Agency,* 484 F.2d 843, 845 (4 Cir., 1973); *Petkas v. Staates,* 501 F.2d 887, 889 (U.S. App., D.C., 1974).

Furthermore, statutory provisions in effect at the time an agreement is made become a part thereof, and contract provisions in conflict with the statute are void. *Wright v. Fidelity and Casualty Company,* 270 N.C. 577, 582, 155 S.E.2d 100, 104 (1967); *Wood v. Lovett,* 313 U.S. 362, 370, 61 S.Ct. 983, 987, 85 L.Ed. 1404 (1941).

Any claimed rights of privacy to preclude public access to the settlement records "fade" in the terminology of the United States Supreme Court in *Cox Broadcasting Corporation v. Cohn,* 420 U.S. 469, 494-495, 95 S.Ct. 1029, 1046, 43 L.Ed.2d 328 (1975);

> Thus even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record. . .

Appellees reiterate that there are no federal constitutional rights of privacy to be asserted here, even if the Appellants had timely and properly raised any federal question on that point in the North Carolina courts (again denied).

VI. The Appeal Does Not Present A Substantial Federal Question; The State Court Judgment Rests On Adequate And Independent State Grounds; And The Appeal Is Frivolous.

The Supreme Court will not decide federal constitutional issues raised before it for the first time on review of state court

decisions. *Webb v. Webb,* 451 U.S. 493, 498, 101 S.Ct. 1889, 1893, 68 L.Ed.2d 392 (1981), and cases cited; 28 U.S. Code §1257(2); Rule 15. As hereinbefore demonstrated, the Appellants did not timely, explicitly and properly present any constitutional or other federal question to any of the North Carolina courts.

Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review by the United States Supreme Court. *Michigan v. Tyler,* 436 U.S. 499, 512, footnote 7, 98 S.Ct. 1942, 1951, 56 L.Ed.2d 486 (1978), and cases cited.

The North Carolina courts held as a matter of state law that the corporate defendant-appellant is an agency of government and that its records sought to be examined by the Appellees are public records open to public inspection under G.S. §132-1 and §132-6.

The Supreme Court lacks jurisdiction to review cases that involve only questions of state law. Thus, the "Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn,* 324 U.S. 117, 125, 65 S.Ct. 459, 463, 89 L.Ed. 789 (1945); *Wolfe v. State of North Carolina,* 364 U.S. 177, 195, 80 S.Ct. 1482, 1492, 4 L.Ed.2d 1650 (1960). Adequate, independent state grounds exist here.

In their Petition for Discretionary Review filed with the North Carolina Supreme Court (paragraph 7), the Appellants contend that "The Court of Appeals erred in its interpretation of two relatively recent cases" (citing the North Carolina Supreme Court cases). However, an objection by an appellant "to the State Supreme Court's application of state law does not raise a federal question appropriate for review by the United States Supreme Court." *Agins v. City of Tiburon,* 447 U.S. 255, 259-260, footnote 6, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980).

By reading the pleadings (R 2-19), the Superior Court Judgment (R 27-31), the opinion of the North Carolina Court

of Appeals (55 N.C. App. 1, 284 S.E.2d 542), the Appellants' Assignments of Error filed in the State Court of Appeals (R 34-38), their Petition for Discretionary Review filed with the North Carolina Supreme Court (Motion to Dismiss, Appendix, 7a), and the Appellants' Jurisdictional Statement, it becomes clear that this appeal is frivolous, and in the words of Mr. Justice Brown in *Chicago, Indianapolis, & Louisville Railway Co. v. McGuire,* 196 U.S. 128, 133, 25 S.Ct. 200, 201, 49 L.Ed. 413 (1904):

> ... This case is the not infrequent one of an attempt to clutch at the jurisdiction of this court *as an afterthought,* when all other resources of litigation have been exhausted. (Emphasis added)

The Appellants have not met their burden of demonstrating that a substantial federal question is presented for review by the Supreme Court, as required by the rules and decisions of this Court. Rule 15.1(h); Rule 16.1(b); *Bailey v. Anderson,* 326 U.S. 203, 207, 66 S.Ct. 66, 68, 90 L.Ed. 3 (1945); *Zucht v. King,* 260 U.S. 174, 177, 43 S.Ct. 24, 25, 67 L.Ed. 194 (1922); Wright and Miller, *Federal Practice and Procedure,* Vol. 16, p. 636, §4014 (1977).

VII. If The Supreme Court Should Determine That The Appeal Was Improvidently Taken And Should Consider It As A Petition For Certiorari, The Petition Must Be Denied For Want Of A Timely, Explicitly And Properly Raised And Preserved Federal Question.

If the Supreme Court should determine that this appeal has been improvidently taken and should regard the attempted appeal as a petition for a writ of certiorari under 28 U.S. Code §2103, then, as so treated, it should be denied because, as required by 28 U.S. Code §1257(3) and Rule 21.1(h) the Appellants have failed to show that in the State courts the validity of a state statute has been drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or that any title, right, privilege or immunity has been specially set up or claimed under the Constitution, treaties or statutes of, or commission held or

authority exercised under, the United States. In other words, treated as a Petition for Certiorari, the Petition must be denied for want of a timely, explicitly, and properly raised and preserved federal question. *Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981) and cases cited.

Appellants have not shown that the North Carolina "court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals." Appellants have not shown that a North Carolina appellate court in these proceedings "has decided an important question of federal law which has not been, but should be, settled by this [Supreme] Court, or has decided a federal question in a way in conflict with applicable dicisions of this court." Rule 17.

The decision of the North Carolina courts that the corporate appellant is an agency of government and that its records sought to be examined by the Appellees are public records under the Public Records Statute is in accord with the decisions of the courts of other states under comparable facts and circumstances. *Glick v. Trustees of Free Public Library*, 2 N.J. 579, 67 A.2d 463 (1949); *Moberly v. Herboldsheimer*, 276 Md. 211, 345 A.2d 855 (Md. App. 1975); *Water Works Board v. White*, 281 Ala. 357, 202 So.2d 721 (1967); *Cavalier v. McCue*, 58 A.D.2d 729, 396 N.Y.S.2d 299 (1977); *Atchison v. Hospital Authority of City of St. Mary's*, 245 Ga. 494, 265 S.E.2d 801 (1980); *Griffin-Spaulding County Hospital Authority v. Radio Station WKEU*, 240 Ga. 444, 241 S.E.2d 196 (1978); *Cleveland Newspapers, Inc. v. Bradley County Memorial Hospital Board of Directors* (Tenn. App., *cert. den.*, Tenn.) 621 S.W.2d 763 (1981); *Schwartzman v. Merritt Island Volunteer Fire Department* (Fla. App.) 352 So.2d 1230 (1977); *cert. den.*, Fla., 358 So.2d 133 (1978); *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.*, 379 So.2d 633 (Fla. 1980).

The arguments hereinbefore made and the authorities cited on the lack of jurisdiction of the Supreme Court to allow the appeal are equally applicable and pertinent to the contention of the Appellees that there are insufficient grounds to warrant review of the judgment and decisions of the North Carolina courts on certiorari.

CONCLUSION

The Appellants have attempted an unwarranted appeal not within the jurisdiction of the Supreme Court for the reasons hereinbefore asserted. Therefore, the case should not be set for argument, but should be dismissed. Likewise, if the appeal papers should be treated as a petition for certiorari, the writ should be denied for the reasons hereinbefore stated.

Respectfully submitted,

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June 22, 1982

APPENDIX

APPENDIX TO MOTION TO DISMISS

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APPENDIX TO MOTION TO DISMISS

FEDERAL STATUTES

28 United States Code, § 1257

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

28 United States Code, § 2103

If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs.

June 25, 1948, c. 646, 62 Stat. 962; Sept. 19, 1962, Pub.L. 87-669, § 1, 76 Stat. 556).

NORTH CAROLINA STATUTES

Session Laws of North Carolina, 1977 (Session 1978), Chapter 1191—Pertinent Section Rewriting G.S. § 143-318.2 and effective date Section

Section 1. * * *

Sec. 2. G.S. 143-318.2 is rewritten to read as follows:

"§ 143-318.2. *All official meetings open to the public*—(a) Except as provided in G.S. 143-318.3, G.S. 143-318.4, and G.S. 143-318.5, each official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting.

(b) As used in this Article, 'public body' means any authority, board, commission, committee, council, or other body of the State, or of one or more counties, cities, school administrative units, or other political subdivisions or public corporations in the State that is composed of two or more members. . .

* * *

In addition, 'public body' means a committee of a public body and the governing board of a 'public hospital', as defined in G.S. 159-39. This provision shall not apply to committees which are not policy making bodies of public hospitals.

* * *

Sec. 9. Sections 1,2,3,4,5,6, and 7 of this act shall become effective on October 1, 1978. Section 8 and 9 are effective upon ratification.

In the General Assembly read three times and ratifies, this the 16th day of June, 1978. (Emphasis added)

Session Laws of North Carolina, 1979, Chapter 655—Pertinent Section enacting G.S. § 143-318.12 (changed in codification to G.S. § 143-318.10) and effective date Section

Section 1. G.S. Chapter 143, Article 33B is repealed, and a new Article 33C is enacted, to read as follows:

"ARTICLE 33C.
"Meetings of Public Bodies.

* * *

"§ 143-318.12. *All official meetings of public bodies open to the public*—(a) Except as provided in G.S. 143-318.13, G.S. 143-318.17, and G.S. 143-318.20, each official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting.

(b) As used in this Article, 'public body' means any authority, board, commission, committee, council, or other body of the State, or of one or more counties, cities, school administrative units, or other political subdivisions or public corporations in the State that is composed of two or more members; . . .

* * *

In addition, 'public body' means (1) the governing board of a 'public hospital' as defined in G.S. 159-39 and (2) each committee of a public body, except a committee of the governing board of a public hospital if the committee is not a policy-making body. (Emphasis added)

* * *

Sec. 4. This act shall become effective October 1, 1979.

NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Rule 10—Exceptions and Assignments of Error in Record on Appeal

(a) Function in Limiting Scope of Review. Except as otherwise provided in this Rule 10, the scope of review on appeal is confined to consideration of those exceptions set out and made the basis of assignments of error in the record on appeal in accordance with this Rule 10. No exception not so set

out may be made the basis of an assignment of error; and no exception so set out which is not made the basis of an assignment of error may be considered on appeal. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly raising them in his brief, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law, notwithstanding the absence of exceptions or assignments of error in the record on appeal.

(b) Exceptions.

(1) General. Any exception which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be set out in the record on appeal and made the basis of an assignment of error. Bills of exception are not required. Each exception shall be set out immediately following the record of judicial action to which it is addressed and shall identify the action, without any statement of grounds or argumentation, by any clear means of reference. Exceptions set out in the record on appeal shall be numbered consecutively in order of their appearance.

(2) Jury Instruction; etc. (omitted)

(c) Assignments of Error—Form. The exceptions upon which a party intends to rely shall be indicated by setting out at the conclusion of the record on appeal assignments of error based upon such exceptions. Each assignment of error shall be consecutively numbered; shall, so far as practicable, be confined to a single issue of law; shall state plainly and concisely and without argumentation the basis upon which error is assigned; and shall be followed by a listing of all the exceptions upon which it is based, identified by their numbers and by the pages of the record on appeal at which they appear. Exceptions not thus listed will be deemed abandoned. It is not necessary to include in an assignment of error those portions of the record to

which it is directed, a proper listing of the exceptions upon which it is based being sufficient.

(d) Exceptions and Cross Assignments of Error by Appellee. (omitted)

NORTH CAROLINA RULES OF CIVIL PROCEDURE

(Embodied in General Statutes § 1A-1)

Rule 8(c)—General Rules of Pleadings

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, truth in actions for defamation, usury, waiver, and any other matter constituting an avoidance or affirmative defense. Such pleading shall contain a short and plain statement of any matter constituting an avoidance or affirmative defense sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Rule 12(b)—Defenses—How Presented

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading,whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defense may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter,

(2) Lack of jurisdiction over the person,

(3) Improper venue or division,

(4) Insufficiency of process,

(5) Insufficiency of service of process,

(6) Failure to state a claim upon which relief can be granted,

(7) Failure to join a necessary party.

"DECLARATION AND WAIVER" EXECUTED BY EACH OF THE THREE MEDICAL PROFESSIONAL ASSOCIATIONS AND FILED WITH THE NORTH CAROLINA COURT OF APPEALS AS A PART OF THE PROCEEDINGS BELOW

Each Declaration and Waiver was substantially in form and content as that executed by Morton Meltzer, M.D., P.A. (by Morton Meltzer, President), which was as follows (bearing the North Carolina Court of Appeals caption and title of the case):

"The undersigned, Morton Meltzer, M.D., P.A., the plaintiff in a civil action formerly pending in the General Court of Justice, Superior Court Division, Wake County, North Carolina, against Wake County Hospital System, Inc., which action was dismissed after settlement was made between the parties, hereby declares that he has no desire to become a party to the above-entitled action now on appeal to the North Carolina Court of Appeals, and hereby waives the right (if any) to become a party and I authorize counsel for the plaintiffs in this action to file this Declaration and Waiver with the North Carolina Court of Appeals."

Petition for Discretionary Review Filed by Appellants in North Carolina Supreme Court

(Denied 3 March 1982)

No. 162PC
TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Fall Term 1981

NEWS & OBSERVER PUBLISHING COMPANY, *et al*

v. From Wake

WAKE COUNTY HOSPITAL SYSTEM, INC., *et al*

PETITION FOR DISCRETIONARY REVIEW UNDER GS 7A-31

(Filed: 15 December 1981)

Wake County Hospital System, Inc., and all other Defendants herein hereby petition the Supreme Court of North Carolina pursuant to NC GS 7A-31 to certify for discretionary review the judgment of the North Carolina Court of Appeals affirming the judgment of the Honorable Thomas H. Lee, Superior Court Judge, that the Defendant be required to allow inspection of certain documents in the possession of the Wake County Hospital System, Inc., by virtue of NC GS 132-1 et seq. except those communications which are specifically exempted from the act by NC GS 132-1.1.

In support hereof, the petitioner shows to the court that:

1. This action was commenced by the News & Observer Publishing Company and others associated with the company for the purpose of obtaining access to certain documents alleged to be in the possession of the Wake County Hospital System, Inc. Those documents involved the settlement of certain contractual claims between the hospital and certain physicians who were at one time in a contractual relationship with the Wake County Hospital System, Inc. The complaint was later amended to request the examination of certain expense accounts of the Board of Trustees and Chief Executive Officer of the Wake County Hospital System, Inc.

2. Wake County Hospital System, Inc. is a private non-profit corporation chartered under NC GS 55A-1 et seq., and operates in all respects as a general business corporation under the laws of the State of North Carolina. Wake County Hospital System, Inc. is unique, however, in that it has a continuing and ongoing relationship with the County of Wake related to the utilization of certain facilities owned by the County of Wake and the provision of indigent care for Wake County and other county residents.

3. One of the major purposes of this litigation was to obtain a determination of whether or not a private non-profit corporation which leases county-owned facilities for a nominal rate and which provides care for medically indigent persons in return for contributions from the general fund of the county to its operating fund is an agency of North Carolina Government as defined in the Public Records Act, to mean " . . . [E]very public office, public officer or official (state or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the state or of any county, unit, special district or other political subdivision of government." NC GS 132-1 (1981).

4. A determination of whether or not the Wake County Hospital System, Inc., as a private non-profit corporation, could be an agency of Wake County poses serious legal difficulties. For the Wake County Hospital System, Inc., however, and its progeny across the state, it poses the more serious questions of

county agency status in general, for example: to what extent is the defense of governmental immunity now available to the Wake County Hospital System, Inc.?; are all county employees required to participate in the state personnel system?; if so, what is the status of the current private retirement system maintained by Wake County Hospital System, Inc.?; should the County now begin to exercise actual control over the operations of Wake County Hospital System, Inc.?

5. The Court of Appeals failed to properly consider the existence of numerous statutes which give the authority to a particular county to contract out the operation of its hospital system and which recognize the power of a county to contract for the provision of hospital services through a non-profit corporation.

a. NC GS 131-9 provides that the Board of Trustees may, jointly with the governing board of the county, lease any hospital established by the county pursuant to this article to any non-profit association or corporation upon such terms and subject to such conditions as will carry out the purposes of the article.

b. Counties and other subdivisions of the state are also authorized to elect to operate public hospitals through public units of government called authorities [NC GS Sec. 131-93] or to elect to contract out such administration to any "public agency" or to "any individual, private organization or non-profit association." NC GS Sec. 131-98(a)(22).

c. Legislative intent to distinguish between public agencies and private corporations in hospital administration is further confirmed, by specific definition, in NC GS Sec. 131-126.18(1), (4), (5), and by authorization to cooperate with "public and private agencies" as the County of Wake did in this case, NC GS Sec. 131-126.19, and by express authority to allow counties to contract or make public hospital arrangements "with any other municipality or other public agency of this or any other state or the United States or with any individual, private organization or non-profit association . . . ." NC GS Sec. 131-126.20(c).

d. The General Assembly has exhibited a plain and clear attempt to distinguish, diametrically contrary to the decision below, leases of hospital facilities to "public or non-profit" agencies and the public operation of hospitals, NC GS Sec. 131-145.

e. Additionally, the North Carolina Open Meetings Law, NC GS Sec. 143-318.1 et seq. recognizes the specific distinction between those hospitals which are public, those which are purely private, and those which are private non-profit corporations operating leased county facilities. This statute specifically includes hospitals leased to non-profit corporations such as Wake County Hospital System, Inc. under its definition of public bodies. This amendment was made in 1979, very close in time to the amendment to the Public Records Law, GS 132-1, at which time the General Assembly failed to make a similar amendment to cover hospitals corporately operated such as the Wake County Hospital System, Inc.

6. Contracting out the use of publicly owned hospital facilities is perfectly appropriate and in concert with the law of North Carolina.

Martin v. Commissioners of Wake County, 208 NC 54, 156 SE 137 (1935) specifically approved a contract which provided county payments of $10,000.00 per year for a term of 35 years to be paid to Rex Hospital, a private non-profit corporation, for care of the sick and indigent. One of the underlying bases for this agreement was to enable Rex Hospital to construct a new facility in order to maintain its license and continue to provide care to the community in general. The North Carolina Court of Appeals failed to properly consider the analogy of that case to the existence of the Wake County Hospital System, Inc. as a private non-profit corporation organized and operating under Chapter 55A of the North Carolina General Statutes and providing indigent care in return for which the following consideration is received: 1) utilization of facilities at a greatly reduced cost; 2) payment of an annual appropriation from the County of Wake; and 3) the cooperation of the County of Wake in long-term financing of capital improvements to the

Wake County Hospital System, Inc. via the use of county issued industrial revenue bonds.

7. The Court of Appeals erred in its interpretation of two relatively recent cases; *Coats v. Sampson County Memorial Hospital,* 264 NC 332, 141 SE 2d 490 (1965), and *Sides v. Cabarrus County Hospital,* 287 NC 14, 213 SE 2d 297 (1975). The factual dispute at issue in *Coats* involved venue for civil litigation filed against Sampson County Memorial Hospital by a supplier of materials. The suit was initially brought in Harnett County, the residence of the Plaintiff. The court, through Justice Sharp, agreed that a private non-profit hospital leasing county facilities was a public agency for the purposes of venue *only.* The Court of Appeals noted that *Coats* dealt with the limited issue of venue but failed to properly interpret the significance of the limited holding. In addition, it should be recognized that this case was decided in 1964, well before many of the statutory enactments referenced in this case by Defendant Wake County Hospital System, Inc. in support of its contention that it has a right to exist and be recognized as a private non-profit corporation.

Consideration by the Court of Appeals of the *Sides* case is inappropriate. *Sides* begins with the question: "Was Cabarrus Memorial Hospital a political subdivision of Cabarrus County or of the State of North Carolina?" It should be obvious that the *Sides* case is totally inappropriate in attempting to determine whether or not a private non-profit corporation is an agency of a county.

8. The Court of Appeals devotes a substantial amount of the opinion to a discussion of the provisions of the bond order currently existing in the form of an operating agreement between the County of Wake and the Wake County Hospital System, Inc. This bond order exists in order to finance certain capital improvements of the hospital system which were necessary in order to maintain the facilities and services of the hospital system. Again, in this respect, the bond order is not unlike the accommodation provided to Rex Hospital in *Martin v. Commissioners of Wake County,* 208 NC 54, 156 SE 137 (1935). The degree of ultimate supervision provided by the operating agreement is only that degree of supervision neces-

sary in order to facilitate the issuance of these bonds through the County of Wake secured by the revenues of the Hospital System. If this arrangement will result in private non-profit hospitals being determined to be agencies of counties, one of the most important and possibly the last major capital resource will have been removed for the financing of long-term indebtedness of hospitals. The demise of this particular source of long-range capital funding will do much to increase the current turnover of private non-profit and county-owned hospitals in rural areas to large private proprietary hospital chains.

9. The Federal Administrative Procedure Act as cited by the Court of Appeals is inappropriate to the circumstance. The Federal Administrative Procedure Act's section on freedom of information [5 USC 552A] contains a substantial number of exceptions, including an entire statutory amendment [552A] which specifically relates to the protection of personal privacy. The position of the Court of Appeals that it is for the legislature to make any adjustments or exceptions in the case of the North Carolina Public Records Act is entirely inconsistent with its utilization of the Federal Administrative Procedure Act which does, in fact, provide such an opportunity for claiming statutory exemptions.

10. The Supreme Court should consider the possibility that the language of the Court of Appeals will require the determination that numerous hospitals within the State of North Carolina are public agencies. Such a determination can have serious implications on the long-term financing of health care institutions, on the management of health care services by county agencies, on the provision of health care services by counties, on the status of private retirement systems currently existing as formed by private non-profit hospitals in the state, on non-health care services which have traditionally been contracted out; for example: trash collection, water quality analysis, public utilities, TV cable franchises, and the like. To allow continued confusion with regard to these unresolved issues could seriously hamper the development of public and quasi-public services in the State of North Carolina.

11. The court failed to recognize the following Genuine Issues of Material Fact raised by the pleading:

a. Whether or not the terms of the settlement of the claim between Dr. Meltzer and the corporate defendant are required by statute to be entered into the minutes of the corporate defendant?

b. Whether or not the failure to enter terms of the settlement in said minutes was a violation of GS 143-318.13(a)(4)?

1. How could a trial court adjudicate what period of time was a "reasonable time after settlement" without *any evidence.*

2. News and Observer in its brief acknowledges that "there is no showing as to what was a reasonable time after the settlements were completed within which the defendant directions were required" to enter the terms in the minutes.

3. Issue raised in pleadings—paragraph 23 of complaint and answer.

c. Whether or not disclosure of settlement would frustrate the purpose of the executive session?

d. Whether or not plaintiff's request for information was for a public purpose?

e. Would disclosure of terms of settlement force the defendants to compromise privileged information?

f. Whether or not the information is a written communication made within the scope of the attorney-client relationship and not open to inspection under GS 132-1.1?

Summary Judgment was improvidently granted, and this lawsuit should be returned to the trial court for a determination of the genuine issues raised by the pleadings.

WHEREFORE, the Petitioner respectfully prays the judgment of the Court of Appeals herein, a copy of which is attached hereto, be certified for discretionary review by the North Carolina Supreme Court. This the 15 day of December, 1981.

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